IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO.87 OF 1995
(BY ACCUSED AGAINST CONVICTION)

1. Ashok Kalappa Bandiva @ Savagave
2. Vasant Dattu Savagave
3. Ravaso Ananda Jong
4. Bapu Sidu Jong
5. Ganpati Sidu Jong
6. Chandrakant Krishna Jong ...Appellants
(Org.Accused Nos.1 to 4, 8 & 10)

Vs.

The State of Maharashtra ...Respondent

WITH

CRIMINAL APPEAL NO.551 OF 1995
(BY STATE AGAINST ACQUITTAL)

The State of Maharashtra ...Appellant
(Org. Complainant)

Vs.

1. Ashok Kalappa Bandiva @ Savagave
2. Vasant Dattu Savagave
3. Ravaso Ananda Jong
4. Bapu Sidu Jong
5. Dhanpal Sidu Jong
6. Shrikant Balu Anuse
7. Mukunda Ramu Jong
8. Ganpati Sidu Jong
9. Ravsao @ Rajaram Sidu Jong
10. Chandrakant Krishna Jong
11. Vilas Anappa Alase
12. Ananda Ramu Jong
13. Appaso Sidu Jong
14. Bapu Ramu Jong ...Respondents
(Org. Accused)

Mr.A.Y.Sakhare with Ms.Varsha Palav for all the accused in both the appeals.

Dr.F.R.Shaikh, APP for State.

CORAM: S.S.PARKAR & ANOOP V.MOHTA,JJ.
January 24, 2005.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. These two appeals have been filed, one against the order of conviction by the accused persons and the other by the State against the order of acquittal dated 12/2/1995 passed by the Addl. Sessions Judge, Kolhapur in Sessions Case No.116 of 1987. Since both the appeals arise from the common judgment and order of the trial Court in the same Sessions Case, these two appeals were heard together and are being disposed of by this common judgment.

2. The relevant facts leading to the present appeals are as follows:

. The incident of assault had taken place on the night of 23rd July 1987 at about 10-30 p.m. in Bhairewadi of village Kurundwad, Tal. Shirol, Dist. Kolhapur where both the sides were residing. The prosecution witnesses as well as the accused were residents of Bhairewadi. In the said incident one Sakharam Karnale had died. According to the prosecution case at the relevant time the deceased and his sons were in the house of complainant PW 5

Mohan. At that time accused nos.1, 4 and 10 went in front of the house of the complainant and accused no.1 said that the complainants had become very proud. The complainant then questioned accused no.1 as to why he was saying so. Thereafter accused no.10 went to his house and came back along with accused nos.2, 3, 4, 5, 7, 8 and 9. They were armed with sticks, iron bars, sickles, chain of motor-cycle and ball of lead and threw challenge to the complainants to come out of their house. When the complainant and his brother Mahadev came out, accused persons started beating them. Then other members of the complainant's side including complainant's father Sakharam came out and the accused assaulted them with the weapons which they were carrying. During the said assault some witnesses were injured and Sakharam fell down and succumbed to his injuries in the hospital. After the incident the police were informed. The injured persons were removed to the Primary Health Centre of the village. Deceased Sakharam was referred to Wanless hospital at Miraj where he died around 5 a.m. in the morning. The complaint of PW 5 was recorded. The spot panchanama was drawn. The dead body was sent for the post-mortem examination. Accused were arrested. The

statements of the witnesses were recorded. There was recovery of weapons at the instance of the accused persons. According to the prosecution case previously there was a complaint lodged against the complainants by the accused which was decided in favour of the complainant's side. After completion of the investigation charge-sheet was filed and the case was committed to the Sessions Court.

3. Before the Sessions Court all the 14 accused were charged for offences under Sections 147, 148, 302 read with Section 149 of IPC and under Section 324 read with Section 149 of IPC. Accused no.5 was charged independently for offence under Section 302 of IPC for causing the death of Sakharam. He was also charged for offence under Section 324 read with Section 34 of IPC along with accused no.10 for causing hurt to Shankar, PW 7. Accused nos.3, 4 and 12 were charged alternatively for offence under Section 324 read with Section 34 of IPC for causing hurt to Mahadev, PW 6. Accused nos.6, 7 and 9 were charged for offence under Section 324 read with Section 34 of IPC for causing hurt to Laxman, son of deceased Sakharam and lastly accused nos.1, 2 and 10 were also charged alternatively for offence under

Section 324 read with Section 34 of IPC for causing hurt to Shivaji Karnale, PW 8. All the accused pleaded not guilty to the said charge.

4. On behalf of the prosecution 16 witnesses were examined. PWs 5 to 9 were injured eye witnesses out of whom PW 5 Mohan Sakharam Karnale, son of deceased Sakharam, had lodged the complaint. PW 10 is Housabai, daughter of deceased Sakharam who was examined as eye witness. PWs 11, 12 and 13 were the witnesses who were residing in the neighbourhood and were examined as eye witnesses. Dr.Suryawanshi, PW 14 was examined to prove the injuries of the prosecution witnesses as well as the accused persons. PW 15 Dr.Dayal had performed autopsy on the dead body. PWs 1 to 4 were panch witnesses while PW 16 PSI Kurle was the Investigating Officer. The defence of the accused was of denial and false implication on account of the previous enmity. On behalf of the accused also cross complaint was lodged in respect of the same incident as some of the accused were injured in that incident.

5. After considering the entire evidence on record the trial Court by its impugned judgment and

order dated 10/2/1995 had acquitted all the accused of the offence under Section 302 of IPC as well as the offence of rioting. The trial Court convicted accused nos. 1 to 4, 8 and 10 for offence under Section 324 of IPC for their acts of assault on different injured witnesses and each of them was sentenced to S.I. for one year and to pay a fine of Rs.500/- in default S.I. for one month. The rest of the accused persons i.e. accused nos.5 to 7, 9 and 11 to 14 were acquitted of all the offences with which they were charged.

6. Feeling aggrieved by the order of conviction the six convicted accused being accused nos.1 to 4, 8 and 10 filed appeal against the order of conviction while State has filed appeal against the order of acquittal against all the 14 accused persons for their acquittal for offences under Sections 147, 148 and 302 read with Section 34 of IPC, which appeals are being disposed of by this common judgment.

7. We heard both the sides at length and perused the record with the assistance of the counsel. While the defence counsel contended that not only the order of acquittal recorded by the trial Court needs to be

confirmed for want of sufficient evidence, but the convicted accused are also entitled for acquittal of the offence under Section 324 of IPC. He strenuously argued that there is no cogent and uniform evidence by the prosecution witnesses as regards the assault on deceased Sakharam and the weapon with which he was assaulted. While some prosecution witnesses allege that accused no.5 had assaulted Sakharam with ball of lead on his head, the other witnesses attribute assault by other accused persons viz. accused nos.2 and 10 with weapons like stick and motor cycle chain on the head of Sakharam who had received only one injury which, according to the medical evidence, could have been caused due to stick or due to fall. On the other hand strenuous effort is made by the learned APP challenging the order of acquittal on the ground that there was unlawful assembly of accused who had assembled there with common object to assault and murder the prosecution witnesses. He points out that as per the Medical Officer the injury suffered by deceased Sakharam could be caused with stick and since accused no.2 is stated to have assaulted on the head of Sakharam with a stick, the said accused along with others by application of Section 149 of IPC are liable to be convicted for the offence of murder.

8. We have perused the evidence with the assistance of the counsel and find ourselves unable to interfere with the order of acquittal recorded by the trial Court for offence under Section 302 of IPC against any of the accused, either against accused no.5 individually or with the aid of Section 34 of IPC against accused nos.2, 5 and 10 or against all the accused with the aid of Section 149 of IPC for the reasons which follow.

9. PW 15 Dr.Dayal, the Medical Officer then attached to Civil Hospital, Sangli had performed autopsy on the dead body. He had noticed following injury on the person of the deceased:

> 7 c.m. sutured wound on the occipital region of the head which was obliquely placed on the left side of the occipital region of the head.

He also noticed internal injury corresponding to the aforesaid injury which was fracture of the left parietal bone of the skull. Blood clots were also seen in the brain. The cause of the death was given

as due to the head injury with intra cerebral haemorrhage. According to him the head injury was possible by forceful blow with muddemal article no.8 i.e. ball of lead. In the cross-examination the doctor has stated that fracture on the head of Sakharam was fisher fracture and was not depressed fracture which can be caused by hard and blunt objects like stick and iron rod. According to him hammer normally causes depressed fracture and article no.8 which is a ball of lead could cause injuries like hammer. He has stated that fracture caused by ball (article no.8) would be depressed fracture. He has further deposed that in case of CLW, the torn surface of the skin corresponds to the length of the weapon and if ball touches any part of the body it would cause an injury of a diameter of about 1 c.m. and would never cause a lacerated wound of 7 c.m. in length. He has emphatically stated that the injury of about 7 c.m. in length x 1/2 c.m. x 1 c.m. is never possible with the use of article no.8. He has further stated that if a man falls on the wooden edge forcefully the aforesaid injury suffered by deceased Sakharam was possible.

10. The complaint, which was lodged immediately

by PW 5 the son of deceased Sakharam, attributes assault to Sakharam only by accused no.5 with the ball of lead (Article no.8). He has deposed so in his evidence supported by other witnesses. The deceased has received only one injury on his head which according to the Medical Officer was not possible with the use of ball of lead allegedly used by accused no.5. No doubt one witness PW 6 Mahadev, brother of the complainant and the son of the deceased attributes assault on Sakharam by stick to accused no.2. PW 6 also attributes assault with chain on the head of the deceased by accused no.10. Since different witnesses attribute assault by three accused persons with different weapons and when the assault with different weapons by three accused has been allegedly made on the head of the deceased who had only one injury, it was difficult to hold as to who was responsible for the fatal injury given on the head of the deceased Sakharam. The complaint which was filed immediately after the incident on the same night speaks only about the assault by accused no.5 with ball of lead on the head of the deceased. PW 8 has attributed assault on the head of the deceased Sakharam by three accused persons i.e. accused no.2 with stick, accused no.5 with ball of lead and

accused no.10 with chain. As against that PW 12 Laxman Mohite has stated in the cross-examination that deceased Sakharam had caught private part of accused no.5 and twisted it and then accused no.5 pushed him forcibly as a result of which Sakharam fell on the wooden frame of bullock cart. This witness was related to the accused persons in as much as he is stated to be son-in-law of accused no.7 but he had not been declared hostile by the prosecution. The defence counsel, therefore, relying on the evidence of the Medical Officer PW 15 Dr.Dayal when he stated that if a man falls on a wooden edge forcibly the injury noticed on the head of the deceased Sakharam was possible, argued that that possibility also cannot be ruled out. However, we do not think that there is any force in the said argument because accused no.5 was not injured accused and no injury to his private part is proved. Nor the defence counsel has brought to our notice that this was the case of the accused in the counter complaint filed by them.

11. However, in view of the different versions given about the assault on deceased, who was an elderly person and, therefore, may not have been

intended to be assaulted by the accused persons, we see no adequate reason to interfere in the order of acquittal recorded by the trial Court with regard to the assault on deceased Sakharam. The reasons given by the trial Court for the acquittal for offence under Section 302 of IPC in relation to the assault on deceased Sakharam cannot be said to be perverse which would warrant interference in this appeal against the order of acquittal. The view taken by the trial Court in that respect appears to be a possible view and, therefore, this Court would not be justified in substituting its own view. The trial Court has found that the injury received by Sakharam is inconsistent with the version of the witnesses and, therefore, the expert's opinion should prevail.

12. The only other substantive offence with which the accused were charged is offence under Section 324 of IPC. Six persons were injured and one person from the side of the complainant had died. Six persons from the side of accused were also injured. In fact accused no.12 had received grievous hurt and, therefore, he was also referred to Wanless Hospital, Miraj along with the seriously injured Sakharam who ultimately succumbed to his injury. Bhausaheb Jong,

who is not an accused person, was also injured. Even accused no.12 had received injuries in the nature of CLWs on parietal region. Persons from both the sides were residing in the same locality and their residential houses were in the vicinity of each other's residence. Since equal number of persons from both the sides were injured, it was a case of free fight between the two groups and in the said fight Sakharam, who was an elderly person, had received an injury on the rear side of his head which resulted in his death. The trial Court, therefore, was of the view that there was no unlawful assembly formed with any common object. No doubt the unlawful assembly can be formed on the spot, however since there was free fight between the two groups, the trial Judge has not given any finding that there was formation of unlawful assembly. He has, therefore, gone by the evidence of the injured witnesses. He has found not only that injured witnesses had attributed assault on them by a particular accused but there has been even corroboration by other witnesses to the evidence of injured witnesses as regards the assault by a particular accused on that witness. Considering that the injuries which were received by the prosecution witnesses were simple in

nature but by use of weapons like sticks and motor cycle chain, they had been convicted for offence under Section 324 of IPC for voluntarily causing hurt by dangerous weapons or means to the witnesses.

13. The trial Court has scanned the entire evidence of assault led by the prosecution witnesses and has very guardedly and cautiously convicted those accused persons against whom there was evidence of assault by the injured himself and further corroborated by other witnesses. In an incident of this kind where there was free fight and six persons on each side were injured and one had died, it was difficult for the witnesses to depose about the assault by individual accused persons. Yet on the basis of the evidence by the injured witnesses on whom assault was made by a particular accused which was supported by other prosecution witnesses, the trial Court has held accused nos.1 to 4, 8 and 10 guilty of the offence under Section 324 of IPC and sentenced each of them to imprisonment for a period of one year and fine of Rs.500/-. The said order of conviction, therefore, is not liable to be set aside and we have no hesitation in confirming the same.

14. Mr.Sakhare contended that the incident took place in the year 1987 i.e. about 17 years ago and all the 14 accused persons were in custody for a period of two weeks except accused no.5 who was released on bail after being under trial prisoner for a period of about six months and, therefore, after passage of so many years the convicted accused may not be sent back to undergo the remaining period of substantive sentence but the same may be reduced to already undergone by them by increasing the fine amount from Rs.500/- to Rs.5000/-. Considering the time period which has elapsed from the date of the incident and the fact that six persons on the side of the accused were also injured, one of whom had received grievous hurt who had also filed cross complaint though that had resulted in acquittal, we find substance in the submission made on behalf of the accused that the accused persons need not be now sent back to undergo the remaining substantive sentence and instead fine amount can be increased as suggested.

15. In the result, Criminal Appeal No.551 of 1995 filed by the State against the acquittal of the accused by the judgment and order dated 10/2/1995

delivered by the Addl. Sessions Judge, Kolhapur in Sessions Case No.116 of 1987 is dismissed and the bail bonds of the respondents-accused shall stand cancelled. So far as Criminal Appeal No.87 of 1995 filed by the accused against the order of conviction in the above Sessions Case is concerned, the same is dismissed with the modification that substantive sentences are reduced to the period already undergone by the appellants-accused and instead the amount of fine payable by the appellants is increased from Rs.500/- to Rs.5000/- each in default to undergo SI for six months. The amount of fine shall be deposited by the appellants within a period of four weeks from today. Their bail bonds shall stand cancelled only on payment of fine by the appellants. When the amount of fine is deposited by the appellants, each of the injured witnesses i.e. P. W. Nos.5 to 9 shall be paid a sum of Rs.5000/- and the remaining amount shall be retained by the State towards the costs.

(S.S.PARKAR,J.)

(ANOOP V.MOHTA,J.)